Highland Yarn Mills, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC. Cases 11–CA–15111 and 11–CA–15224

March 12, 1993

NOTICE TO SHOW CAUSE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On September 29, 1992, the Regional Director for Region 11 of the National Labor Relations Board issued a complaint and notice of hearing in Case 11–CA–15111 alleging that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (2), (3), (4), and (5) and Section 2(6) and (7) of the National Labor Relations Act. On December 30, 1992, Case 11–CA–15111 was consolidated with Case 11–CA–15224 and the cases were set for hearing on February 1, 1993.

On January 4, 1993, the Respondent filed with the Board in Washington, D.C., a Motion for Partial Summary Judgment and Memorandum in Support, with exhibits attached. The Respondent asserts that certain matters alleged as violations in Case 11–CA–15111,[1] were known or should have been known by the General Counsel when he issued a prior consolidated complaint in Cases 11–CA–14814 and 11–CA–14868 on March 24, 1992, or at the time of trial of those cases in June and July 1992.[2] According to the Respondent, these allegations are precluded by *Jefferson Chemical Co.*, 200 NLRB 992 (1972), which limits piecemeal litigation as a matter of administrative economy. See also *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961). The principle underlying these cases is that the General Counsel may not litigate an unfair labor practice allegation predicated on events which the General Counsel knew or should have known about when issuing an earlier complaint or at the time of the trial in that earlier complaint, if that allegation is of the same general nature as, or is related to, an allegation in the earlier complaint.

On January 12, 1993, the General Counsel filed an opposition to Respondent's motion and on January 19, 1993, the Charging Party filed a response. The General Counsel contends that the allegations in Case 11–CA–15111 are not precluded by *Jefferson Chemical* because they are not sufficiently related to the allegations in Cases 11–CA–14814 and 11–CA–14868 and were not contemporaneous with the allegations previously litigated. The General Counsel also argues that the Respondent has not shown that the General Counsel was aware of the facts supporting the allegations in Case 11–CA–15111 at the time of the trial of the complaint in Cases 11–CA–14814 and 11–CA–14868 or that the General Counsel reasonably could have discovered those facts.

On January 27, 1993, the Board issued an order transferring proceeding to the Board.

The pertinent facts are as follows. Pursuant to charges in Cases 11–CA–14814 and 11–CA–14868 filed in January and February 1992, the General Counsel issued a consolidated complaint in March 1992 alleging various 8(a)(1), (3), and (5) violations. These alleged violations occurred in October through December 1991. The consolidated complaint went to hearing before an administrative law judge in June and July 1992, but no decision has issued. Pursuant to charges filed in Cases 11–CA–15111 and 11–CA–15224 in August and November 1992, respectively, the General Counsel issued a consolidated complaint on December 30, 1992, alleging various 8(a)(1), (2), (3), (4), and (5) violations. The Respondent's motion is directed to those alleged violations in Case 11–CA–15111 which occurred in February through early June 1992, prior to the hearing in Cases 11–CA–14814 and 11–CA–14868, which closed July 24, 1992.

Under *Jefferson Chemical* and *Peyton Packing* principles, the General Counsel may litigate complaint allegations in a subsequent proceeding if he was unaware of the events that form the basis for the allegations at the time of the earlier hearing and the events were not commonly known or readily discoverable after investigation, or the events were independent acts. See, e.g., *Great Western Produce*, 299 NLRB 1004 fn. 1 (1990). However, once a respondent has made a

[1] The Respondent's motion refers to certain paragraphs in the complaint in Case 11–CA–15111. This complaint was later consolidated with Case 11–CA–15224. It is the consolidated complaint which is currently before the Board. However, the paragraph numbers relevant to this motion are the same in the complaint in Case 11–CA–15111 as in the consolidated complaint. The Respondent seeks summary judgment regarding the allegations in paragraphs: 9 (establishment of a peer review committee in February 1992 in violation of Sec. 8(a)(1) and (3)); 11 (issuance of a written warning to Charles McDonald on April 29, 1992, in violation of Sec. 8(a)(1), (3), and (4)); 13 (discriminatory layoffs of two employees in February and March 1992 in violation of Sec. 8(a)(1) and (3)); 14 (discriminatory discharge of two employees in March and early June 1992 in violation of Sec. 8(a)(1) and (3)); 15 and 16 (conclusory paragraphs regarding factual allegations set forth in pars. 11 and 12); and, 22, 23, and 24 (further conclusory paragraphs). The Respondent's motion also covers the 8(a)(5) allegations in paragraphs: 21(a) (February 10, 1992 establishment of peer review committee); (b) (February 10, 1992 refusal to accept grievances); (c) (March 1992 refusal to allow Union to accompany OSHA inspectors on tour of plant); (f) (March and May 1992 refusal to permit Union access to discuss grievances); (g) (March and May 1992 causing Union to incur additional expenses to process grievances); (i) (unilaterally combining two jobs into one in February 1992); (k) (layoff in March 1992); (l) (removal of union bulletin boards and mail boxes in February 1992).

[2] Allegations in Cases 11–CA–14814 and 11–CA–14868 included numerous incidents of independent 8(a)(1) conduct; no 8(a)(2) conduct; various 8(a)(3) violations occurring from September to December 1991 including warnings, a denial of overtime, and a discharge; no 8(a)(4) conduct; and a withdrawal of recognition occurring in December 1991.

prima facie showing under *Jefferson Chemical*, we believe that the burden shifts to the General Counsel to rebut that showing. More particularly, if a respondent shows that the allegations of a ''new'' complaint pertain to events that occurred prior to the hearing in an earlier case and that these new allegations are closely related to the allegations of the earlier case, the burden shifts to the General Counsel to show that he did not know, and could not reasonably have discovered, the earlier events at the time of the hearing in the earlier case *or* that the allegations of the new complaint are not closely related to the allegations of the earlier case. We consider this an equitable allocation of the burden of proof, for the General Counsel is in the best position to know what he knew, or should have known, at the time of the hearing in the earlier case. Further, it is not dispositive that at the time of the earlier hearing there was no outstanding charge concerning those earlier events that are the subject of the ''new'' complaint. There was obviously *a* charge concerning the events involved in that earlier hearing. Under that charge, the General Counsel could investigate, and issue a complaint on, the allegations of that charge *and allegations closely related thereto*.[3] Thus, assuming the requisite close relationship, the General Counsel could investigate, and issue complaint on, all events occurring prior to the time of the hearing in the earlier case. Under *Jefferson Chemical*, we believe that the General Counsel must follow that course.[4]

We find that the Respondent has met its prima facie burden under *Jefferson Chemical*. Accordingly, the burden has shifted to the General Counsel to show why the motion should not be granted with respect to those unfair labor practices alleged in Case 11–CA–15111 that: (1) occurred before the July 24, 1992 close of the hearing in Cases 11–CA–14814 and 11–CA–14868; and (2) appear to be closely related to certain of the unfair labor practices alleged in Cases 11–CA–14814 and 11–CA–14868. For example, at the hearing in Cases 11–CA–14814 and 11–CA–14868, the parties litigated a September 19, 1991 warning to Charles McDonald that allegedly violated Section 8(a)(3). In Case 11–CA–15111, the General Counsel alleges that McDonald received a written warning on April 29, 1992, in violation of Section 8(a)(3) and (4), and was unlawfully discharged on June 2, 1992. In Case 11–CA–15111, the General Counsel also alleges layoffs, discharges, warnings, and denials of overtime in violation of Section 8(a)(3) or Section 8(a)(3) and (4). These allegations cover the period February 26 to June 2, 1992. All occurred prior to the hearing in Cases 11–CA–14814 and 11–CA–14868 in which other warnings, a denial of overtime, and a discharge were litigated as alleged violations of Section 8(a)(3). In Cases 11–CA–14814 and 11–CA–14868, the General Counsel litigated a blanket allegation of 8(a)(5) withdrawal of recognition in December 1991. In Case 11–CA–15111, the General Counsel alleges various discrete violations of Section 8(a)(5) from February to March 1992. All the allegations in Case 11–CA–15111 that are the subject of the Respondent's motion should be discussed in response to this notice.

The Board having duly considered the matter,

NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before March 26, 1993 (with affidavit of service on the parties to this proceeding), why the Respondent's motion should not be granted. Among other things, responses to this notice should address the following: (1) whether the General Counsel was aware or should reasonably have been aware, prior to the close of the hearing in Cases 11–CA–14814 and 11–CA–14868, of some or all the facts forming the basis for those allegations in Case 11–CA–15111 that are subject of the Respondent's motion; (2) the relationship, if any, between the subject allegations in Case 11–CA–15111 and the allegations in Cases 11–CA–14814 and 11–CA–14868; and (3) why, if the General Counsel could have incorporated some or all the subject allegations in Case 11–CA–15111 in the complaint in Cases 11–CA–14814 and 11–CA–14868, he did not do so.

[3] *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

[4] We recognize that an amendment of the complaint at hearing may require that the Respondent be given a continuance so that a defense can be prepared. We also recognize that the judge, in his/her discretion, may disallow the amendment. If this occurs, the General Counsel would be free to litigate the allegations in a later proceeding.